



# Executive Newsletter

February 2010

**The Association of  
Independent Schools of  
New South Wales Limited**

Level 12, 99 York Street  
Sydney NSW 2000  
Phone (02) 9299 2845  
Fax (02) 9290 2274  
Web [www.aisnsw.edu.au](http://www.aisnsw.edu.au)  
Email [ais@aisnsw.edu.au](mailto:ais@aisnsw.edu.au)  
ABN 96 003 509 073

**Dear Colleague,**

Firstly I would like, belatedly, to wish all schools a welcome back to the school year. Last year was again very busy, challenging and successful for our sector and we can expect this to continue in 2010. In our first Executive Newsletter for the year I thought it would be worthwhile to outline some of the most significant reforms that will have a major impact on the work of AISNSW and on independent schools.

Of greatest significance is the new cooperative federalism under the COAG education agenda, with key players such as Treasury, PM&C and state/territory departments of education, plus new players ACARA, AITSL and Fair Work Australia, all moving the sector through a period of structural change and a revolutionary stage involving transparency, accountability, assessment of performance and a review of school funding.

Consultations on the Australian Curriculum and teacher and school leadership standards are progressing and it is very important that the independent sector actively participates in these consultations. Silence from the sector is likely to be interpreted as agreement so I encourage schools to make contributions to any consultations undertaken in these areas, in addition to the representations made by the AIS and other school organisations.

The Australian Government's transparency agenda took another step forwards on 28th January with the release of the *My School* website and the predictable, but statistically challenged, media league tables. The site will be extended in the future to display a school's income or expenditure and the results of surveys of a school's parent body and possibly teaching staff. AISNSW, through ISCA, has raised a number of issues with ACARA including the handling of *My School* data by the Sydney Morning Herald, the high stakes nature of the NAPLAN tests and security procedures for test implementation.

In relation to the reporting of financial information, Ray Whitfield from AISNSW has been appointed to ACARA's Financial Data Working Group to represent the independent sector. Many issues confront the Working Group including comparability of recurrent income, the challenge in reporting capital income or expenditure across sectors, the identification in the government sector of all private income raised, the distribution of system expenses and the benefits of the economies of scale enjoyed by a system over individual schools. As you are aware, an independent school's financial information is audited prior to release to DEEWR and it is essential that not only the methodology used to construct government school financial data is transparent, but that the data are also audited by an external agency.

The Government has now established the Australian Institute for Teaching and School Leadership (AITSL). The Deputy Prime Minister has appointed the Board and I am pleased to advise that the Executive Director of AISNSW will be the independent sector's nominee on the Board.

Continued on back page

## The Fair Work Act - what schools need to know

### ***The Fair Work Act 2009: A simplified regime that will complicate employment relations in independent schools.***

Prior to the 2007 federal election, when Labor released its IR policy, the strategy was to convince business groups that the Rudd Government would not depart substantially from Work Choices but would merely seek to remove the elements of the legislation which were unpopular with the electorate. To some extent this strategy was successful, with business leaders such as Heather Ridout (AiG) and Sir Rod Eddington giving the policy their support.

However, the devil is always in the detail, and the legislation, which is supposed to modernise industrial relations in Australia, is decidedly retro. The manner in which the *Fair Work Act 2009* [the Act] is drafted reveals an old-fashioned view that all bosses will take advantage of their employees at the first opportunity and the only thing that will stop this is legislation and the presence of unions.

The Act contains many hidden benefits for the union movement. The two main benefits arise from the award modernisation process and the requirement for employers to consult with unions.

### **Award Modernisation**

The reduction in industrial instruments makes it easier for employers to determine their legislative obligations. However, a side effect of the award modernisation process is union consolidation. Prior to modern awards, the Independent Education Union [IEU] had coverage of all school support staff with the exception of those workers who were covered by the Liquor, Hospitality and Miscellaneous Workers Union [LHMU]. The modern award for general

staff covers all non-teachers employed in independent schools across Australia. This industry award provides the IEU with an opportunity to expand its membership base significantly to include all non-teaching employees including cleaners, caretakers, kitchen staff and childcare workers.

### **The obligation to consult**

The requirement to consult with the union enhances union visibility in the workplace. This in turn helps to grow membership. Industrial democracy is a good thing but the reality is an increase in union members in the workplace makes it more difficult to make discretionary management decisions without union involvement. The Act assumes that unions (as representatives of employees) are equal stakeholders in the organisation and therefore they should have a say in operational decisions.

A good example is in the redundancy provisions in the Act. The Act states that a genuine redundancy can be unfair if the employer fails to consult with the relevant union (not just with the employee but also the union if there are any union members). Consultation about impending redundancies is good practice. However, the Act dictates that a genuine redundancy is deemed unfair if the employer fails to consult appropriately as determined by Fair Work Australia even if the redundancy is genuine in all respects.

In his keynote address delivered to 180 CEO Institute members recently, Joydeep Hor, Managing Partner at Harmers Workplace Lawyers, commented that: *"the external environment is more favourable to the union's momentum than arguably has ever been the case in Australia's history"*.

### **Other aspects of the Fair Work Act that will affect the way independent schools conduct their employment relations**

IEU organisers will make good use of the provisions of the Act by ensuring that they are involved, or at least seeking to be involved, in a broad range of issues at school level. Individual schools are already experiencing the incursion of the IEU into discretionary decisions such as start and finish times, what will be presented at PD days and when they will occur, and changes to the timetable.

Some other provisions of the Act that will complicate employment relations at school and sector level include:

#### **1. The obligation to explore redeployment options**

The Act requires the employer to consider redeployment options within the enterprise and associated enterprises before making an employee's position redundant. On face value this appears reasonable, but it may require systems that have a central administration, which is usually the employing body, to consider redeployment options across the system. While this provision has not yet been tested under the Act, failure to comply may result in the employee's redundancy being considered unfair.

#### **2. The obligation to consider flexible working arrangements**

Most schools go out of their way to accommodate the needs of their employees, but it can be difficult to juggle the needs of the students and staff to the satisfaction of all parties. Independent schools will find that more often they will be negotiating these arrangements with the union on behalf of their members.

## The Fair Work Act - what schools need to know

Currently, the agreements in place in the sector provide for disputes of this kind to be dealt with under a dispute resolution clause with no provision for arbitration.

On 25th January 2010, Commissioner Greg Smith rejected a proposed deal between Woolworths and the Shop Assistants Union because it did not require or allow third-party arbitration in relation to disputes unless both sides agreed. Fair Work Australia's decision to reject the proposal despite it being an agreed position will provide incentive for the IEU to seek agreement clauses allowing for disputes about flexible working arrangements and other matters to be dealt with via arbitration. Woolworths are in the process of appealing Commissioner Smith's decision.

### 3. The requirement to bargain in good faith

Independent schools that decide to bargain individually (as opposed to becoming part of a multi-enterprise agreement) will need to follow the rules of good faith bargaining which means they must attend meetings, disclose relevant information in a timely manner, genuinely consider proposals made by the IEU, and refrain from conduct which can be considered to be capricious or unfair. Unfair conduct may include negotiating directly with employees without involving the union.

In *National Union of Workers v Defries Pty Ltd [2009]* Commissioner Whelan said that the employer had engaged in unfair conduct which undermined freedom of association because it circulated a draft agreement to the employees for their vote without prior notification to the union, without giving the union and employees an opportunity to propose any amendments and without responding to union proposals about the agreement's content.

### 4. Adverse action

The freedom of association provisions and other protections have been re-written and now appear in the Act as 'Rights and responsibilities of employees, employers and organisations'. The main provision is that a person must not take adverse action against another person because he or she:

- exercises a workplace right
- makes a complaint (which could include lodging an internal grievance)
- is or is not a member of an industrial association
- has engaged in or not engaged in industrial activity
- or on the basis of other criteria such as race, colour, sex, etc.

The alleged reason need only be one of the reasons for the alleged conduct. Of most concern is the fact that the onus is on the employer to prove they have not taken adverse action. Further, adverse action is not limited to dismissal; it also includes warning letters or other disciplinary action.

Independent schools may find that in a dispute situation, the union will use the adverse action provisions to prevent the school from taking disciplinary action against an employee. This provision provides just another avenue for the union to take disputes to Fair Work Australia for resolution rather than settling them at school level.

### What does this all mean for independent schools?

As of 1 January 2010, the Fair Work Act 2009 covers all independent schools in NSW, taking into account some transitional provisions for ex-state jurisdiction schools. The fact that all independent schools are now covered by the same legislative regime has advantages. There is safety in numbers

for independent schools. Centrally negotiated multi-enterprise agreements will protect schools from intense and often emotive negotiations on-site. Some schools are well equipped to sit around the negotiating table with more than one union. Most schools do not have the resources to attend meetings or to determine whether the log of claims from the union is reasonable in comparison to similar schools or within the sector.

Agreement negotiation aside, the leaders of independent schools will need to develop strategies to manage the clear intention of the IEU to be involved in nearly all decisions or changes that involve their members. Principals should maintain direct relationships with their employees and ensure that any change in the workplace is managed consultatively with a free flow of information in both directions.

The only way to lessen the involvement of the union in day-to-day decision-making processes is to engage directly with your staff so that they do not feel the need to seek advice about impending change. In other words, principals who develop a relationship of trust and confidence with their employees will be in the best position to manage employment relations in the current industrial climate.

Member schools with concerns or questions about the *Fair Work Act* and its effect on their operations should contact a member of the AIS Employment Relations team.

## **Dr Geoff Newcombe**

Executive Director  
gnewcombe@aisnsw.edu.au

## **Michael Carr**

Deputy Executive Director  
Director: Employment Relations  
mcarr@aisnsw.edu.au

## **Frank Brooks**

Director: ICT  
fbrooks@aisnsw.edu.au

## **David Buley**

Director: Finance & Administration  
dbuley@aisnsw.edu.au

## **Estelle Lewis**

Director: Teacher Accreditation  
elewis@aisnsw.edu.au

## **Cate Pinnington**

Director: Professional Services  
cpinnington@aisnsw.edu.au

## **Julie Thompson**

Director: Professional Development  
jthompson@aisnsw.edu.au

## **Maree Townsend**

Director: Risk & Compliance  
mtownsend@aisnsw.edu.au

## **Robyn Yates**

Director: Government Education Policy  
ryates@aisnsw.edu.au

The AIS leadership team invites you to contact them on (02) 9299 2845 or via email to discuss any of the issues raised in this newsletter or other schooling matters.

## **... continued from page 1**

The DPM has clearly articulated the Government's expectations of AITSL and this includes, but is not limited to:

- Finalising and maintaining a set of national standards for teaching and school leadership
- Implementing an agreed system of national accreditation of teachers based on the agreed standards
- Using the standards as the basis for new prestigious national awards for teachers and school leaders
- Advancing excellence and national leadership in the professional development of teachers and school leaders, and
- The accreditation of pre-service teacher education.

Finally, the Government has stated there will be a review of school funding during the period 2010-2011. To date there are no terms of reference for the review but AISNSW has sought and will continue to seek these and request that the Government publicly state its position on the funding of all independent schools prior to the next federal election.

The AISNSW Board is establishing a Funding Review Committee which will make recommendations to the Board on the policy positions it may agree to in this crucial area.

These issues all have the potential to significantly affect independent schooling. We will update schools throughout the year as developments occur

**Dr Geoff Newcombe**  
Executive Director

## **AIS staff changes and additions**

As a result of the increasing and changing demands in a number of areas the beginning of 2010 has seen many staffing changes at the AIS.

National Partnerships Coordinators have been appointed to work with the AIS team in the NP focus areas of literacy and numeracy, low SES schools and Indigenous education. I am pleased to welcome Lynne Stone and Colleen Catford who are working with schools identified for assistance under the National Partnerships programs.

Clare Morrissey has been recruited as Senior Advisor: Risk and Compliance to assist with the increased demands in the child protection area. Maree Townsend is now the Director: Risk and Compliance with Kate Halloran appointed as Assistant Director following the retirement of Grahame Wilson.

We also welcome Cynthia Haskell as the Asian Languages Consultant, Leanne Woodley as a Special Education Consultant and Heather Chand as the VET Consultant, replacing Rod Leverment.

We are also commencing the process of replacing and updating our schools and contacts database and have recruited a Database Administrator, Giovanni Trono, to assist with this process.

In response to the Federal Government's education agenda Robyn Yates is now Director: Government Education Policy, while Cate Pinnington has been appointed as Director: Professional Services with overall responsibility for students with special needs and targeted programs.

We welcome our new staff and trust that these additions and changes will help the AIS to continue to offer high quality services that meet the needs of all independent schools in NSW.